Lifeway Foods, Inc. *and* Bakery, Confectionary, Tobacco Workers, and Grain Millers International Union, Local Union No. 1. Case 13–CA–156570

May 24, 2016

DECISION AND ORDER

BY CHAIRMAN PEARCE AND MEMBERS MISCIMARRA AND HIROZAWA

This is a refusal-to-bargain case in which the Respondent is contesting the Union's certification as bargaining representative in the underlying proceeding. Pursuant to a charge filed by Bakery, Confectionary, Tobacco Workers, and Grain Millers International Union, Local No. 1 (the Union), the General Counsel issued the complaint on July 30, 2015, alleging that Lifeway Foods, Inc. (the Respondent) has violated Section 8(a)(5) and (1) by refusing the Union's request to bargain following the Union's certification in Case 13–RC–113248. (Official notice is taken of the record in the representation proceeding as defined in the Board's Rules and Regulations, Secs. 102.68 and 102.69(d). *Frontier Hotel*, 265 NLRB 343 (1982).) The Respondent filed an answer and an amended answer admitting in part and denying in part the allegations of the complaint, and asserting affirmative defenses.

On November 20, 2015, the General Counsel filed a Motion for Summary Judgment. On November 23, 2015, the Board issued an order transferring the proceeding to the Board and a Notice to Show Cause why the motion should not be granted. On December 21, 2015, the Respondent filed a response to the notice to show cause and statement in opposition to the Motion for Summary Judgment.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

Ruling on Motion for Summary Judgment

The Respondent admits its refusal to bargain,[1] but contests the validity of the Union's certification on the basis of its objections to the election in the underlying representation proceeding. In addition, the Respondent argues for the first time, as an affirmative defense, that the "appointment of and service by Lafe Solomon as Acting General Counsel for the National Labor Relations Board violated the Federal Vacancies Reform Act," 5 U.S.C. §§ 3345 et seq. (FVRA), and that therefore "acts taken pursuant to his authority by his appointee Regional Director Ohr, including issuance of this complaint, are similarly invalid." (Answer to complaint at p. 8.)

Specifically, citing *SW General, Inc. v. NLRB,* 796 F.3d 67 (D.C. Cir., Aug. 7, 2015), rehearing denied, Jan. 20, 2016, petition for certiorari filed April 6, 2016, the Respondent maintains that Solomon's service as Acting General Counsel was invalid under the FVRA as of January 5, 2011, when the President submitted his nomination to the Senate for the position of General Counsel. Thus, the Respondent contends, Solomon lacked authority to appoint Regional Director Ohr, whose appointment was announced in a press release dated December 13, 2011. The Respondent further contends that because Ohr's 2011 appointment was not valid, the July 30, 2015 complaint issued by Ohr in this proceeding is not valid.

We reject the Respondent's arguments. First, we find that the Respondent's challenge to Ohr's appointment as Regional Director for Region 13 is procedurally deficient because it is untimely. As noted above, Regional Director Ohr's appointment was announced in December 2011. However, the Respondent did not make any effort to challenge the appointment or the authority of Regional Director Ohr during the underlying representation proceeding, which commenced in 2014. Indeed, the Respondent signed a Stipulated Election Agreement, in which it agreed to the conduct of the election under the authority of Regional Director Ohr, and it did not make any challenge to Ohr's appointment or authority before the hearing officer or in its exceptions to the Board. Rather, the Respondent first raised its challenges to the authority of Solomon and Ohr in 2015, as an affirmative defense to this refusal-to-bargain complaint.

Under Section 102.67(f) of the Board's Rules and Regulations in effect at the time of this representation proceeding,[2] a party may not litigate in an unfair labor practice proceeding any issue that could have been raised in the underlying representation proceeding. See *Pittsburgh Plate Glass Co. v. NLRB*, 313 U.S. 146, 162 (1941). Because the Respondent failed to assert any infirmity concerning the service of Solomon under the

[1] The Respondent's amended answer does not admit the allegations of complaint par. VI (b), which state that since about June 19, 2015, the Respondent has failed and refused to recognize and bargain with the Union as the exclusive collective-bargaining representative of the unit, asserting that this paragraph states a legal conclusion to which no admission or denial is required, and further stating that it had no obligation to recognize and bargain with the Union because the Board improperly issued the certification. However, the Respondent's amended answer does admit the allegations of complaint par. VI (c), which state that the Respondent's purpose in refusing to bargain is to test the certification the Board issued in Case 13–RC–113248.

[2] The Board's revised Rules and Regulations, effective April 14, 2015, include this provision at Sec. 102.67(g).

FVRA or the appointment and authority of Ohr in the underlying representation case, it is estopped from raising those matters here.

Second, even assuming that we were to consider the merits of the Respondent's arguments, we would find no basis for dismissing the complaint. As the Respondent makes clear in its response to the notice to show cause, its challenge to the authority of Director Ohr is based entirely upon its premise that "Regional Directors are appointed by the General Counsel." Response at p. 11. The Respondent is mistaken. Section 4(a) of the National Labor Relations Act (NLRA) expressly vests the authority to appoint regional directors in the Board. That section states in relevant part: "*The Board shall appoint an executive secretary, and such attorneys, examiners, and regional directors*, and such other employees as it may from time to time find necessary for the proper performance of its duties." (Emphasis added.)

The Respondent's contrary argument is based upon its misunderstanding of a 1955 document published in the Federal Register titled: "Board Memorandum Describing the Authority and Assigned Responsibilities of the General Counsel of the National Labor Relations Board." 20 Fed. Reg. 2175 (1955). Section VII of that memorandum addresses personnel matters and states as follows:

> the General Counsel . . . is authorized and has responsibility, on behalf of the Board, to select, appoint . . . all personnel engaged in the field offices and in the Washington office [with listed exceptions for specific Board personnel]; provided, however, that *no appointment . . . of any Regional Director or Officer in Charge shall become effective except upon the approval of the Board*. Id. at 2176 (emphasis added).

In 1961, the Board published a "Further Amendment to Memorandum Describing Authority and Assigned Responsibilities" which, inter alia, amended section VII of the memorandum to expressly state that "personnel action with respect to Regional Directors . . . will be conducted as hereinafter provided," and the proviso language was changed to the following independent statement:

> The appointment . . . of any Regional Director . . . shall be made by the General Counsel *only upon the approval of the Board*. 26 Fed. Reg. 3911–3912 (emphasis added).

By so circumscribing the General Counsel's personnel authority, the Board has reserved to itself the full authority to appoint regional directors pursuant to Section 4(a) of the NLRA. Where any "appointment" by the General Counsel is ineffective unless it has the approval of the Board, the Board is the appointing authority. See *Free Enterprise Fund v. Public Co. Accounting Oversight Board*, 561 U.S. 477, 512–513 and fn. 13 (2010), and cases cited therein (Securities and Exchange Commission, as head of department, satisfied Appointments Clause by retaining authority to approve appointment of inferior officers).

On December 7, 2011, a Board comprised of a quorum of three validly appointed members appointed Peter Ohr as Regional Director for Region 13. *SW General*, supra, which pertains solely to Solomon's status, has no significance to the Board's exercise of its statutory appointment authority, and offers no support for the Respondent's challenge to Ohr's appointment as Regional Director by the Board.

Finally, we find no merit in the Respondent's argument that the unfair labor practice complaint here is invalid. On November 4, 2013, General Counsel Richard F. Griffin Jr. took office after Senate confirmation. The unfair labor practice charge was filed on July 23, 2015, following the Board's June 10, 2015 certification of the Union as the exclusive collective-bargaining representative of unit employees. The charge allegations were thus investigated by the Region and the complaint issued by the Regional Director under the undisputed authority of General Counsel Griffin.

All representation issues raised by the Respondent were or could have been litigated in the prior representation proceeding. The Respondent does not offer to adduce at a hearing any newly discovered or previously unavailable evidence, nor does it allege any special circumstances that would require the Board to reexamine the decision made in the representation proceeding. We therefore find that the Respondent has not raised any representation issue that is properly litigable in this unfair labor practice proceeding. See *Pittsburgh Plate Glass,* supra. Accordingly, we grant the Motion for Summary Judgment.

On the entire record, the Board makes the following

FINDINGS OF FACT

I. JURISDICTION

At all material times, the Respondent has been a corporation with offices and places of business in Skokie, Morton Grove, and Niles, Illinois, and has been engaged in the production of dairy products known as kefir, organic kefir, probiotic cheeses, and related products.[3]

[3] The Respondent denies the complaint allegation that it "has been engaged in the supply, manufacture, and distribution of cultured dairy products known as kefir, organic kefir, probiotic cheeses, and related products" and admits only that it "produces" the described dairy prod-

In conducting its business operations described above, during the calendar year ending on December 31, 2014, the Respondent sold and shipped from its Morton Grove, Niles, and Skokie, Illinois facilities goods valued in excess of $50,000 directly to points outside the State of Illinois.

We find that the Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act, and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. The Certification

Following the representation election held on June 19, 2014, the Union was certified on June 10, 2015, as the exclusive collective-bargaining representative of employees in the following appropriate unit (the unit):

> All full-time and regular part-time production/maintenance, production, maintenance, and shipping/receiving employees employed by the Employer at its facilities currently located at 7645 North Austin Avenue, Skokie, Illinois, and 6431 West Oakton, Morton Grove, Illinois, and 6101 West Grosse Point Road, Niles, Illinois; but excluding office clerical employees and guards, professional employees and supervisors as defined in the Act.

The Union continues to be the exclusive collective-bargaining representative of the unit employees under Section 9(a) of the Act.

B. Refusal to Bargain

At all material times, George de la Fuente held the position of Director of Human Resources and has been a supervisor of the Respondent within the meaning of Section 2(11) of the Act and an agent of the Respondent within the meaning of Section 2(13) of the Act.

About June 19, 2015, the Union, by letter, requested that the Respondent recognize and bargain with it as the exclusive collective-bargaining representative of the unit, and since about that date the Respondent has failed and refused to recognize and bargain with the Union. We find that this failure and refusal constitutes an unlawful failure and refusal to recognize and bargain with the Union in violation of Section 8(a)(5) and (1) of the Act.

CONCLUSION OF LAW

By failing and refusing since about June 19, 2015, to recognize and bargain with the Union as the exclusive collective-bargaining representative of employees in the appropriate unit, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and (1) and Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has violated Section 8(a)(5) and (1) of the Act, we shall order it to cease and desist, to recognize and bargain on request with the Union and, if an understanding is reached, to embody the understanding in a signed agreement.

To ensure that the employees are accorded the services of their selected bargaining agent for the period provided by law, we shall construe the initial period of the certification as beginning the date the Respondent begins to bargain in good faith with the Union. *Mar-Jac Poultry Co.,* 136 NLRB 785 (1962); accord *Burnett Construction Co.*, 149 NLRB 1419, 1421 (1964), enfd. 350 F.2d 57 (10th Cir. 1965); *Lamar Hotel*, 140 NLRB 226, 229 (1962), enfd. 328 F.2d 600 (5th Cir. 1964), cert. denied 379 U.S. 817 (1964).

ORDER

The National Labor Relations Board orders that the Respondent, Lifeway Foods, Inc., Skokie, Morton Grove, and Niles, Illinois, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Failing and refusing to recognize and bargain in good faith with Bakery, Confectionary, Tobacco Workers, and Grain Millers International Union, Local Union No. 1 as the exclusive collective-bargaining representative of the employees in the bargaining unit.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) On request, bargain with the Union as the exclusive collective-bargaining representative of the employees in the following appropriate unit on terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement:

> All full-time and regular part-time production/maintenance, production, maintenance, and shipping/receiving employees employed by the Employer at its facilities currently located at 7645 North Austin Avenue, Skokie, Illinois, and 6431 West Oakton, Morton Grove, Illinois, and 6101 West Grosse Point Road, Niles, Illinois; but excluding office clerical employees

ucts. This denial does not raise any issue of fact warranting a hearing, particularly in light of the Respondent's admission that it is an employer engaged in commerce within the meaning of the Act.

and guards, professional employees and supervisors as defined in the Act.

(b) Within 14 days after service by the Region, post at its facilities in Skokie, Morton Grove, and Niles, Illinois, copies of the attached notice marked "Appendix."[4] Copies of the notice, on forms provided by the Regional Director for Region 13, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. If the Respondent has gone out of business or closed a facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since June 19, 2015.

(c) Within 21 days after service by the Region, file with the Regional Director for Region 13 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. May 24, 2016

Mark Gaston Pearce, Chairman

Philip A. Miscimarra, Member

Kent Y. Hirozawa, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

[4] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT fail and refuse to recognize and bargain with Bakery, Confectionary, Tobacco Workers, and Grain Millers International Union, Local Union No. 1 as the exclusive collective-bargaining representative of the employees in the bargaining unit.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights listed above.

WE WILL, on request, bargain with the Union as the exclusive collective-bargaining representative of the employees in the following appropriate unit concerning terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement:

All full-time and regular part-time production/maintenance, production, maintenance, and shipping/receiving employees employed by us at our facilities currently located at 7645 North Austin Avenue, Skokie, Illinois, and 6431 West Oakton, Morton Grove, Illinois, and 6101 West Grosse Point Road, Niles, Illinois; but excluding office clerical employees and guards, professional employees and supervisors as defined in the Act.

LIFEWAY FOODS, INC.

The Board's decision can be found at www.nlrb.gov/case/13–CA–156570 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.